Supreme Court, U.S.
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No. 94-969

In The

Supreme Court of the United States

October Term, 1994

ROY L. ODEKIRK,

Petitioner,

v.

IMPERIAL PALACE, INC. V.E.B.A. TRUST EMPLOYEE MEDICAL BENEFIT PLAN; IMPERIAL PALACE, INC. V.E.B.A. TRUST AND RALPH ENGELSTAD, AS TRUSTEE; PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

JAMES H. WALTON, ESQ.
NITZ, WALTON & HEATON
514 S. Third Street
Las Vegas, NV 89101
(702) 474-4004

Counsel of Record for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the "doctrine of reasonable expectations" recently adopted by the Ninth Circuit applies to an ERISA-governed employee medical benefit plan which contains unambiguous exclusionary language.

2. Whether the ERISA-governed employee medical benefit plan in the case at bar satisfied the "doctrine of reasonable expectations" as adopted by the Ninth Circuit.

3. Whether the Ninth Circuit took into consideration the Petitioner's argument regarding the application of the "doctrine of reasonable expectations" in reaching its decision.

4. Whether this Court should grant certiorari to review questions regarding a doctrine which has not yet been fully developed by the Ninth Circuit and which involve no important issues of federal law or conflicts between the Circuits.

RULE 29.1 LIST

Respondent, Provident Life and Accident Insurance Company, has a parent company by the name of Provident Life and Accident Insurance Company of America which is publicly traded.

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TO THE HONORABLE SUPREME COURT:

Imperial Palace, Inc. V.E.B.A. Trust Employee Medical Benefit Plan; Imperial Palace, Inc. V.E.B.A. Trust and Ralph Engelstad, as Trustee; and Provident Life and Accident Insurance Company, Respondents, respectfully submit this brief in opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the

Ninth Circuit, filed herein by Petitioner, Roy L. Odekirk, and received by Respondents on November 30, 1994.

I

STATEMENT OF THE CASE

Respondents' adopt Petitioner's Statement of the Case on pages 1 through 3 of the Petition for Writ of Certiorari ("Petition"), except for the inaccuracies and/or omissions which Respondents' correct hereinbelow.

The quoted portions from the Imperial Palace, Inc. V.E.B.A Trust Employee Medical Benefit Plan ("Plan") on page 2 of the Petition are inaccurate insofar as the definitional terms and phrases used therein are not italicized. The proper quotes are as follows: "Expense for a *work related illness*"; and "an *illness* which arises from or is sustained in the course of work for pay, profit, or gain."

In identifying what arguments were presented on appeal to the Ninth Circuit on page 2 of the Petition, the Petitioner omitted the fact that Respondents countered his alternative argument concerning the application of the doctrine of reasonable expectations. The inclusion of this fact is important to show that the issue on the doctrine's application was fully briefed before the Ninth Circuit.

II

REASONS FOR DENYING WRIT

A. SUMMARY

The Petitioner contends that the doctrine of reasonable expectations (adopted by the Ninth Circuit two days

before the decision in the case at bar was entered) applies to the present case but erroneously was never addressed by the Ninth Circuit.

Respondents rebut this contention on several grounds. First, Respondents argue that the doctrine does not apply. This argument is based on the premise that the Ninth Circuit adopted the doctrine of reasonable expectations as merely a rule of construction to be applied only as a means of resolving ambiguities in ERISA-governed contracts. Since the Ninth Circuit found the language in Respondents' ERISA-governed Plan to be unambiguous, there was no need for the Circuit to apply the doctrine.

Secondly, Respondents argue that even if the Ninth Circuit adopted the doctrine as more than a rule of construction, the ERISA-governed Plan in the present case satisfies the requirements as outlined by the Ninth Circuit in the recent decision in which the doctrine was adopted.

Under the circumstances of either of Respondents' first two arguments, any failure of the Ninth Circuit to consider the application of the doctrine would merely constitute harmless error.

Thirdly, Respondents' alternatively argue that the Ninth Circuit did in fact consider the Petitioner's argument concerning the application of the doctrine despite the fact that the Circuit's memorandum did not expressly acknowledge the doctrine by name as a basis for its conclusion.

Finally, Respondents argue that this case presents no issue appropriate for the exercise of this Court's jurisdiction insofar as there is no important question of federal

law or conflict among the circuits presented by the facts of this case which requires adjudication or clarification.

B. THE "DOCTRINE OF REASONABLE EXPECTATIONS" RECENTLY ADOPTED BY THE NINTH CIRCUIT DOES NOT APPLY TO AN ERISA-GOVERNED EMPLOYEE MEDICAL BENEFIT PLAN WHICH CONTAINS UNAMBIGUOUS EXCLUSIONARY LANGUAGE

Respondents do not dispute that the Ninth Circuit recently rendered a decision in which it adopted "the doctrine of reasonable expectations as a principle of the uniform federal common law informing interpretation of ERISA-governed insurance contracts". *Saltarelli v. Bob Baker Group Medical Trust*, 35 F.3d 382 (9th Cir. 1994). Respondents do, however, take issue with Petitioner's application of that doctrine to the present case.

Petitioner claims that the doctrine is more than a rule of construction and that it may be applied when no ambiguities exist in the language of an ERISA-governed insurance contract. The Petitioner relies on two Ninth Circuit cases to support this proposition, *Saltarelli, supra,* and *State Farm Mutual Automobile Insurance Company v. Betty Falness,* ___ F.3d ___, 1994 WL 596451, 94 Daily Journal D.A.R. 15492 (9th Cir. 1994).

Petitioner's reliance on *Saltarelli* is misplaced. Petitioner mischaracterizes the law in *Saltarelli* by saying the Ninth Circuit applied the doctrine of reasonable expectations in the absence of ambiguous policy language.

In *Saltarelli, supra,* the Ninth Circuit agreed with the lower court that the exclusionary language at issue was

not clear or plain. *Id.* 35 F.3d at 385, 387. In effect, the Court was saying the exclusionary language was ambiguous. Clearly, this was not a case in which the Ninth Circuit initially found such language to be unambiguous, but decided to apply the doctrine of reasonable expectations despite such clear, plain, and unambiguous language, as Petitioner suggests.

Respondents submit that the Ninth Circuit's adoption of the doctrine of reasonable expectations in *Saltarelli*, as a principle of uniform federal law, was merely as a rule of construction to be applied when language in ERISA-governed plans is ambiguous. The Ninth Circuit's analysis leading up to the adoption of this doctrine supports this conclusion. First, the Ninth Circuit acknowledges that the doctrine "grew out of the law of adhesion contracts and construction of ambiguities in insurance policies". *Id.* 35 F.3d at 386. The Ninth Circuit then quotes from *National Mutual Insurance Co. v. McMahon & Sons, Inc.*, 177 W. Va. 734, 356 S.E.2d 486 (1977), a case which indicates the doctrine will only be applied to enforce liability against an insurer when its policy exclusions are not conspicuous, plain, and clear. *Id.* 35 F.3d at 386. Finally, the Ninth Circuit refers to two other circuit cases which have touched on the issue of application of the reasonable expectations doctrine. *Id.* 35 F.3d at 386, note 5.

In this regard, the Eighth Circuit found that since the ERISA contract at issue contained no ambiguities, there was no occasion to apply the doctrine of reasonable expectations. *Meester v. IASD Health Services Corp.*, 963 F.2d 194, 197 (8th Cir. 1992). The Fifth Circuit's reference to this doctrine was more indirect. In *Pitts v. American*

Security Life Insurance Company, 931 F.2d 351 (5th Cir. 1991), the Fifth Circuit agreed with the lower court that the insured's reasonable expectation of continued coverage was one of several reasons supporting the holding that the policy therein was voidable rather than void. *Id.* 931 F.2d at 355-356. Coverage was also allowed on the basis of waiver.

The foregoing analysis used by the Ninth Circuit in reaching its decision to adopt the reasonable expectations doctrine, together with the language used by the Ninth Circuit when actually applying the doctrine (i.e. that the exclusionary language must be "clear, plain and conspicuous" (*Saltarelli, supra*, at 387) to avoid application of the doctrine), supports the conclusion that the Ninth Circuit intended to adopt this doctrine as merely a rule of construction to be used when interpreting an ERISA-governed contract.

Petitioner's reliance on *State Farm Mutual Automobile Insurance Company v. Betty Falness*, ___ F.3d ___, 1994 WL 596451, 94 Daily Journal D.A.R. 15492 (9th Cir. 1994) is also misplaced. *Falness* is wholly inapplicable to the case at bar for three reasons. First, in *Falness*, the Ninth Circuit was reviewing a decision involving a coverage issue under an automobile liability insurance policy. The insurance policy being reviewed was not governed by ERISA, state law was not preempted, and therefore, the uniform federal common law was not applicable. To the contrary, the Ninth Circuit in *Falness* relied solely on Arizona state law in determining whether and to what extent the doctrine of reasonable expectations applied. Thus, the scope of the doctrine, as applied in *Saltarelli*, was in no way

effected by the Ninth Circuit's decision in *Falness*. Secondly, unlike the instant case, the contract provisions in *Falness* were ambiguous and unclear. Thirdly, the decision in *Falness* was rendered on November 2, 1994, after the decision in the case at bar was entered. A change in judicial view of the applicable law, after entry of final judgment, is not a basis for vacating a judgment entered before the change. *Arley v. Liberty Mutual Fire Insurance Company*, 85 Nev. 541, 458 P.2d 742 (1969); *John Simmons Co. v. Grier Bros. Co.*, 258 U.S. 82, 42 S.Ct. 196, 66 L.Ed. 475 (1922); *Scotten v. Littlefield*, 235 U.S. 407, 35 S.Ct. 125, 59 L.Ed. 289 (1914).

In the present case, Petitioner was denied coverage under Respondent, Imperial Palace, Inc. V.E.B.A. Trust Employee Medical Benefit Plan ("Plan") due to a provision under the Plan which provided: "**Covered Expense Does Not Include:** Expense for a *work related illness*." (Petitioner's Appendix 11a) The Ninth Circuit found this exclusionary language to be unambiguous. (Petitioner's Appendix 2a and 3a) Therefore, the doctrine of reasonable expectations was inapplicable. There simply was no occasion for the Ninth Circuit to address Petitioner's argument regarding that doctrine's application. Thus, any error attributed to the Ninth Circuit for its failure to do so, is harmless. See Rule 61, Federal Rules of Civil Procedure.

C. EVEN IF THE DOCTRINE APPLIES, THE ERISA PLAN IN THE PRESENT CASE SATISFIED THE DOCTRINE AS ADOPTED BY THE NINTH CIRCUIT

Even if this Court were to accept Petitioner's argument that the Ninth Circuit adopted the doctrine of reasonable expectations as more than a rule of construction which may be applied in the absence of ambiguous policy language, the Respondents submit that the Plan's exclusionary language satisfies the doctrine set forth in *Saltarelli, supra.*

Petitioner contends that the doctrine applies because a "painstaking study" is required in order for an employee to understand the Plan exclusion. This contention is absurd. From the very beginning, the Plan's introduction spells out in plain language that the first section gives definitions to be used throughout. (Respondents' Appendix 3a) The Plan further states that when a word is *italicized* (providing an illustration of what italicized means by actually putting that word in italics), that means it is a defined term. (Respondents' Appendix 3a) The Plan's provisions for medical expense coverage state specifically which expenses are covered and which are not. (Respondents' Appendix 4a and Petitioner's Appendix 11a) These lists are preceded by bold type headings indicating the same. Furthermore, the first sentence under the "Covered Expenses" heading begins with a disclaimer that states: "Subject to the section entitled **Covered Expenses Does Not Include** [which is in bold print], Covered Expenses shall include . . . " (Respondents' Appendix 4a) The actual exclusion involved herein is *"work related illness"* which is italicized, thus directing

the reader to look at the definitions. (Petitioner's Appendix 11a) A very simplistic approach indeed.

Not only is the applicable exclusion clearly set forth in the section on exclusions in the Plan entitled "**Covered Expenses Does Not Include**", but the Petitioner is immediately put on notice of this section in the Plan's Table of Contents. (Respondents' Appendix 1a and 2a) It defies logic to contend that a "painstaking study" is required to understand the meaning of the exclusion.

Basically, Petitioner is asserting that his reasonable expectation regarding the Plan exclusion for "*work related illness*" was that such an exclusion wouldn't apply because he would not expect the word "*illness*" to include "bodily injury". However, if you follow this line of reasoning to its logical end and thereby presume Petitioner won't read the Plan's definitions, then it's also safe to assume that Petitioner had no reasonable expectation that he would be covered by the Plan, since the Plan only covers expenses for those services and supplies which are furnished for diagnosis and treatment of an "*illness*" (Respondents' Appendix 4a), and Petitioner's condition resulted from bodily injury.

Petitioner also argues that it was reasonable for him to surmise that the *work related illness* exclusion (excluding injuries sustained in the course of work for pay, profit or gain) refers only to work for the Imperial Palace which would be covered by worker's compensation. However, the *work related illness* exclusion was contained in an entirely separate paragraph than the exclusion for injuries covered by worker's compensation (Petitioner's Appendix 11a). Regarding this issue, the Ninth Circuit

expressly noted that " . . . a separate provision covered worker's compensation". (Petitioner's Appendix 2a). It would therefore not be logical or reasonable to conclude that the two separate and distinct exclusions were the same.

The foregoing analysis of the exclusion in the present case demonstrates how greatly it differs from the exclusion analyzed in *Saltarelli, supra.* In *Saltarelli,* the plan's Table of Contents provided no reference to a section in the body of the plan regarding exclusions. *Id.* 35 F.3d at 385. In addition, although a subsection entitled "Exclusions and Limitations" was included in the plan, there was no mention in that subsection of the particular exclusion at issue. *Id.* The exclusion at issue was for "pre-existing conditions" and it could only be found in the midst of the "Definitions" chapter. Furthermore, the definitions provided for the phrase "pre-existing conditions", were not plain or clear. Therefore, the Ninth Circuit found that the "exclusion was not clear, plain and conspicuous enough to negate layman Saltarelli's objectively reasonable expectations of coverage". *Id.* 35 F.3d at 387.

In the present case, not only was the exclusion for *"work related illness"* conspicuously placed in the Plan, but the Ninth Circuit specifically found that it was explicitly defined and that overall it "was explicit enough to put an insured layperson on notice that he loses coverage when he performs outside work for pay". (Petitioner's Appendix 2a and 3a).

Clearly, the requirements of the doctrine of reasonable expectations adopted by the Ninth Circuit have been satisfied and therefore, the exclusionary language in the

Plan is enforceable. Thus, even if the Ninth Circuit did not specifically address Petitioner's argument regarding the application of the doctrine, (a point Respondents dispute in the argument set forth hereinbelow) it was merely harmless error given the fact that the requirements of the doctrine were satisfied. See Rule 61, Federal Rules of Civil Procedure.

D. IN REACHING ITS DECISION, THE NINTH CIRCUIT TOOK INTO CONSIDERATION THE PETITIONER'S ARGUMENT REGARDING THE APPLICATION OF THE DOCTRINE

Based upon the language used by the Ninth Circuit in analyzing the exclusionary language under the Plan, Respondents alternatively argue that the Petitioner's argument concerning the application of the doctrine of reasonable expectations was taken into consideration by the Circuit Court when reaching its decision in the case at bar.

In addressing the district court's determination that "[t]he language was not explicit enough . . . to put a *reasonable* [emphasis added] insured layperson on notice that he loses benefits when he performs any [emphasis in original] outside work for pay, no matter how slight", the Ninth Circuit specifically held that the language of the Plan was in fact "explicit enough to put an insured layperson on notice that he loses coverage when he performs outside work for pay". (Petitioner's Appendix 2a) As noted above, the Ninth Circuit also rejected the Petitioner's argument that it was reasonable for him to surmise that the exclusion was a worker's compensation

exclusion, since that exclusion was stated in a separate paragraph. The Ninth Circuit further held that the phrase *"work related illness"* was explicitly defined and therefore unambiguous. (Petitioner's Appendix 3a)

The Ninth Circuit's determination in the present case fully comports with its decision in *Saltarelli, supra.* The language employed by the Ninth Circuit in the present case imports the same meaning as the language used by the Ninth Circuit in *Saltarelli*; i.e., that the Plan's exclusion was "clear, plain, and conspicuous enough" to negate an insured layperson's objectively reasonable expectations of coverage.

The issue regarding the application of the doctrine of reasonable expectations was not only fully briefed, but was argued by Petitioner and Respondents to the Ninth Circuit and apparently was considered by the Ninth Circuit in its decision.

E. THE NINTH CIRCUIT HAS NOT YET DEVELOPED THE SCOPE OF THIS RECENTLY ADOPTED DOCTRINE, THEREFORE, CERTIORARI SHOULD NOT BE GRANTED TO REVIEW QUESTIONS REGARDING THE DOCTRINE WHICH DO NOT INVOLVE IMPORTANT ISSUES OF FEDERAL LAW OR CONFLICTS BETWEEN THE CIRCUITS

This Court should only grant a petition for writ of certiorari when a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; has decided a federal question in a way that conflicts

with applicable decisions of this Court; or when the case involves an important question of federal law which has not been, but should be, settled by this Court. Rule 10, Rules of the Supreme Court (Jan. 1, 1990).

Since this Court has never addressed the issue of whether the doctrine of reasonable expectations should be applied when interpreting ERISA-governed plans, the Ninth Circuit's decision to adopt the doctrine in this context in no way conflicts with any applicable decisions of this Court.

Furthermore, there doesn't appear to be any conflict among the circuit courts. In addition to the Ninth Circuit, there are only two other circuits that have even touched on this issue. The Eighth Circuit has indicated that it would apply the doctrine of reasonable expectations to an ERISA-governed contract as a rule of construction to resolve ambiguities. *Meester v. ISAD Health Services Corp.*, 963 F.2d 194, 197 (8th Cir. 1992). Additionally, while the Fifth Circuit uses the phrase "reasonable expectations" in its decision it does not refer to it as a doctrine being applied in the ERISA context or otherwise. *Pitts v. American Security Life Insurance Company*, 931 F.2d 351, 355-356 (5th Cir. 1991). The case was also decided on other grounds, and does not explain the Circuit's interpretation of the scope of the doctrine.

The Ninth Circuit adopted the doctrine of reasonable expectations as a principle of the uniform federal common law, to be applied when interpreting ERISA-governed insurance contracts. Neither the Eighth Circuit nor the Fifth Circuit have refused to adopt this doctrine, therefore, these circuits are not in conflict with the Ninth

Circuit's holding in *Saltarelli, supra*. This Court has previously held that "[a] principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the Circuit Court of Appeals . . . concerning the meaning of provisions of federal law." *Braxton v. U.S.*, 111 S.Ct. 1854, 114 L.Ed.2d 385 (1991).

Finally, the present case does not involve a question of federal law significant enough to warrant review by this Court. Although the Ninth Circuit adopted the doctrine of reasonable expectations as a principle of the uniform federal common law, the Circuit expressly left the "comprehensive delineation of the doctrine's scope to future cases". *Saltarelli*, 35 F.3d at 387, n.8. Thus, even the Ninth Circuit recognizes that this newly created federal law needs to be more fully developed.

The issue regarding the doctrine's application to the Petitioner in this case is not ripe for review by this Court. This Court does not sit for the benefit of the particular litigants. *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed. 897 (1955). Rather, it grants review only when there are special and important reasons therefor, which implies a reach to a problem beyond the academic or the episodic. *Id.*

Based on the foregoing, there is no reason for this Court to grant certiorari.

III

CONCLUSION

Respondents respectfully request that this Court deny the Petition for Writ of Certiorari because the case presents no issue appropriate for the Court's review insofar as (1) no prejudicial error was committed by the Ninth Circuit; and, (2) no important question of federal law or conflict among the circuits requires adjudication or clarification.

DATED: December 28, 1994.

Respectfully Submitted:

JAMES H. WALTON
NITZ, WALTON & HEATON
514 South Third Street
Las Vegas, NV 89101
(702) 474-4004

Counsel of Record
for Respondents

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INTRODUCTION

The text on the pages which follow describes your Life, Accidental Death and Dismemberment, Medical and Dental Plans and includes the limitations and all other provisions which apply to you.

Your Plan Booklet is divided into three parts. The first part describes definitions, eligibility, and termination provisions, which apply to all coverages. The second part describes Group Life Insurance and Accidental Death and Dismemberment Benefits which are underwritten by Provident Life & Accident Insurance Company. The third part outlines and describes the Medical and Dental Benefits which are funded by Imperial Palace, Inc. V.E.B.A. Trust

- With respect to definitions, eligibility, and termination, provisions, any reference to dependents' coverage applies to you only if you have dependents covered under the *Plan*.
- With respect to your Group Life Insurance and Accidental Death and Dismemberment Benefits, the insured *member* is referred to as "you" and Provident Life & Accident Insurance Company is referred to as "we", "our", or "us".
- With respect to Medical Benefits, the *covered person* is referred to as "you", and Imperial Palace, Inc. V.E.B.A. Trust is referred to as "we", "our", or "us".

All *italicized* words have specific definitions. These definitions can be found either in the **Definitions** sections or in the same section where the italicized term is used.

* * *

COVERED EXPENSE

Subject to the section entitled **Covered Expense Does Not Include**, Covered Expense shall include only the charges for the services and supplies listed below which: (1) Are furnished to a *covered person* for diagnosis or treatment of an *illness*; (2) Are of the usual type furnished for such purpose; (3) Do not exceed the usual and customary charges within the area in which the expense is incurred; and (4) Have been authorized by a *doctor*.

- Services and supplies which are furnished by, and fall within the scope of the authorized practice of, a *health care provider*, provided that:

  - For *hospital* room and board, Covered Expense for any day shall not exceed the *hospital's* most common semi-private room daily rate. However, this limit: (1) Shall not apply to a unit for intensive or specialized care; and (2) Shall be changed to the most common private room daily rate when a private room is used on order of a *doctor* or because the *hospital* is not equipped with semi-private rooms.

  - Covered Expense for any day of confinement in a *nursing home* shall not exceed 50% of the average semi-private room daily rate for *hospitals* in the area in which the *nursing home* is located. *Nursing home* confinement must start within seven days after *hospital confinement* ends.

  - Covered Expense includes charges for a *birthing center* provided that such coverage shall cease at the end of a 24 hour period following the birth of the child.

– Covered Expense includes charges for hospice care made by a *hospice* only if: (1) The expense is incurred by a *covered person* diagnosed by a *doctor* as terminally ill with a prognosis of six months or less to live; and (2) The *hospice* provides a plan of care which: (A) Is prescribed by the *doctor;* (B) Is reviewed and approved by the *doctor* monthly; (C) Is not for any curative treatment; (D) States the belief of the *doctor* and the *hospice* that the hospice care will cost less in total than any comparable alternative to hospice care; and (E) Is furnished to the *Claims Administrator.*

* * *